United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1219

To be argued by
RICHARD G. CHOSID

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B
PMS

UNITED STATES OF AMERICA,

Appellee,

-against-

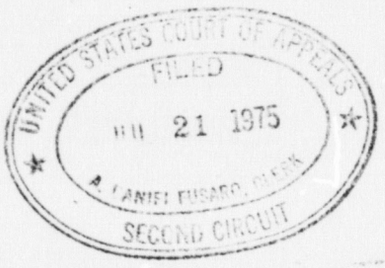
JOHN P. BOMMARITO,

Appellant.

Docket No. 75-1219.

BRIEF FOR APPELLANT
JOHN P. BOMMARITO

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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ISSUES PRESENTED

1. Whether a conspiracy conviction is barred when only two persons have been found to have formed the alleged conspiracy to commit a crime, which itself, necessarily required the concerted action of at least two persons for its commission?

   Defendant-Appellant Answers YES.

2. Whether the mere evidence of a buy-sell relationship between the parties in this case will support a conviction for conspiracy?

   Defendant-Appellant Answers NO.

3. Whether a previous conviction for conspiracy to violate Federal Narcotics Laws Acts, serves as a bar to the present conspiracy conviction?

   Defendant-Appellant Answers YES.

4. Was the evidence presented at Trial sufficient to convict Appellant of the crime of aiding and abetting?

   Defendant-Appellant Answers NO.

5. Whether the Second Count of the Indictment charging Mr. Bommarito with the substantive crime of distribution of narcotics also sufficiently apprises him of the charge of aiding and abetting such distribution as is required by the notice requirements of the United States Constitution?

   Defendant-Appellant Answers NO.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This Appeal involved alleged violations of the federal narcotics laws on the part of John P. Bommarito. Mr. Bommarito was charged under a two Count Indictment filed in the United States District Court, Southern District of New York.

Count I of this Indictment charged Mr. Bommarito with Conspiracy to Distribute and Possess with Intent to Distribute a Controlled Substance, to-wit: Methamphetamine, in violation of Sections 812, 841 (a)(1) and 841 (b)(1)(B) of Title 21, United States Code. Count II of the Indictment charged Mr. Bommarito with the Distribution and Possession with Intent to Distribute Methamphetamine in violation of the United States Code Sections stated above.

Charged along with Mr. Bommarito in this Indictment were Herbert Wolf and Louis Ciraco, who was referred to as an unindicted co-conspirator.

The Trial in this cause was had before the Honorable Richard Owen, United States District Judge for the Southern District of New York on March 4, 5 and 6, 1975. The Trial was held without a Jury.

Prior to the commencement of the Trial, Mr. Bommarito made a Motion to Dismiss Count I of the Indictment, based upon double jeopardy grounds. Mr. Bommarito also moved to have Count II dismissed, since it charged him with the substantive offense of Possession with Intent to Distribute Methamphetamine,

on March 8, 1974 in New York, and Mr. Bommarito knew he had never been in New York during this time period. This Motion was subsequently denied by the Honorable Richard Owen.

At the close of all the evidence, the Court found Herbert Wolf innocent of the conspiracy charge and innocent of the charges recited in Count II. of the Indictment.

As to Mr. Bommarito, the Court found him guilty on both Counts of the Indictment. Mr. Bommarito was subsequently sentenced to four (4) years imprisonment. It is from these convictions that Mr. Bommarito takes this Appeal.

Statement of Facts

On December 28, 1973, Louis Ciraco, an unindicted co-conspirator in the present case, travelled to the Miami area of Florida, hoping to find a contact from whom he could purchase narcotics. After his arrival in the Miami area, Mr. Ciraco eventually met Herbert Wolf, who was charged as a co-conspirator with Mr. Bommarito in this matter.

Mr. Ciraco moved in with Herbert Wolf and asked Mr. Wolf if he knew of anyone from whom he, Mr. Ciraco, could possibly purchase narcotics. Mr. Wolf informed Louis Ciraco that he knew of someone who might be able to aid Mr. Ciraco and made a couple of telephone calls to an unknown person. (Transcript Page 27.) This person to whom the telephone call was made, was later identified through trial testimony as John Bommarito.

Approximately three weeks after the above conversation, Mr. Bommarito met Mr. Ciraco during a party aboard Mr. Wolf's boat. As a result of this meeting, Mr. Bommarito agreed to sell Louis Ciraco one pound of Methamphetamine for a price of $5,000.00. Since Mr. Ciraco indicated at this time that he could not pay for the narcotics immediately, Mr. Bommarito offered to allow Mr. Ciraco to take the Methamphetamine on credit, but the price was increased to $5,500.00.

This arrangement was subsequently agreed to by both parties, and several days later, Mr. Ciraco took delivery of one pound of Methamphetamine. Mr. Ciraco then left for New York.

After Mr. Ciraco had returned to New York, there ensued some telephone conversations between Mr. Ciraco and Mr. Bommarito. During these conversations, the two parties discussed the $5,500.00 owed by Mr. Ciraco to Mr. Bommarito as payment for the Methamphetamine which had been provided to him in Florida. The substance of these conversations was that Mr. Bommarito wanted to know when he would receive his money and Mr. Ciraco answering these inquiries. Around the beginning of March, 1974, Mr. Ciraco sent Mr. Bommarito $1,500.00 as partial payment on the price owed for the Methamphetamine.

On or about March 8, 1974, Mr. Ciraco was arrested by federal narcotics agents in New York while attempting to sell part of the Methamphetamine purchased from the Florida sale. After his arrest, Mr. Ciraco was asked if he would agree to cooperate with government narcotics officers. Mr. Ciraco agreed to cooperate and thus, as of March 9, 1974, if not earlier, Mr. Ciraco began working as an informer for the Government.

Now a Government informer, on March 9, 1974, Mr. Ciraco called Mr. Bommarito and told him he now had the remaining $4,000.00 which was owed as payment on the Methamphetamine purchased in Florida. This money was to be supplied by the Government. As a result of this conversation, it was agreed that both parties would meet in Detroit for the purpose of making the payment.

On March 13, 1974, Mr. Ciraco flew to Detroit accompanied by two Drug Enforcement Administration Agents, Mr. Anderson and Mr. Senneca. After arriving in Detroit, Mr. Ciraco telephoned Mr. Bommarito and informed him that he had brought a

friend who would be interested in purchasing narcotics.

At this time, a meeting was set up at which time Mr. Ciraco paid Mr. Bommarito the $4,000.00 remaining due. At this same meeting, Mr. Senneca, who was acting in an undercover role, approached Mr. Bommarito regarding the possible purchase of Methamphetamine. Subsequent to this meeting, arrangements were finally formulated for the sale of ten (10) pounds of Methamphetamine to Mr. Senneca. The delivery was to take place in New Jersey, while a simultaneous payment was being made in Detroit. During this transactional period, one (1) pound of Methamphetamine was delivered to Mr. Ciraco's motel room.

After the sale had been thus negotiated, the federal agents and Mr. Ciraco returned to New York. Upon their return, the deal which had been established in Detroit was called off by the federal narcotics agents.

On or about March 23, 1974, Mr. Ciraco called Mr. Bommarito and told him that he had sold the one (1) pound, which he had received in Detroit, to Mr. Senneca, for which he had received $5,500.00. Mr. Ciraco then informed Mr. Bommarito he would be coming to Florida to pay for this pound with the money he had received from selling this pound to Mr. Senneca.

Mr. Ciraco did fly to Florida and pay Mr. Bommarito $5,000.00 for the Methamphetamine. However, there had never been a sale of the pound from Louis Ciraco to Anthony Senneca, since both men were government agents at this time. The money given to Mr. Bommarito was simply furnished from government funds.

After this contact between Mr. Bommarito and Mr. Ciraco, the dealings between the parties subsequently ended. It was after this relationship between the parties had fully ended that Mr. Bommarito was arrested upon the charges presently before this Court.

The Trial in this matter began on March 4, 1975. At the time of commencement of this Trial, Mr. Bommarito had already pled guilty to conspiracy to violate federal narcotics law as the result of an Indictment issued in the United States District Court for the Western District of Oklahoma. Count I. of this Indictment charged Mr. Bommarito as having been a co-conspirator in a plot to distribute Cocaine and Methamphetamine. The conspiracy was alleged to have been in operation from about February of 1974. Mr. Bommarito was specifically charged with having delivered ten (10) pounds of Methamphetamine in Oklahoma in this Indictment.

Furthermore, prior to the Trial in this matter, Mr. Bommarito pled guilty to a narcotics violation in the United States District Court for the Southern District of Florida. This activity had occurred in April of 1974. The exact charge against Mr. Bommarito was Possession with Intent to Distribute Methamphetamine, in violation of Section 841(a)(1), Title 21, United States Code.

ARGUMENT

I

WHERE THE CRIME NECESSARILY INVOLVES MUTUAL COOPERATION OF TWO PERSONS AND THEY HAVE COMMITTED IT, THEY MAY NOT BE CONVICTED OF A "CONSPIRACY" TO COMMIT IT.

Mr. Bommarito was found guilty of conspiring with one Louis Ciraco to violate federal narcotics laws. The evidence presented at Trial showed that Mr. Bommarito had sold one (1) pound of Methamphetamine to Louis Ciraco in Florida. Mr. Ciraco was an unindicted co-conspirator in this matter. Also named in the Indictment as a co-conspirator was Herbert Wolf. However, Mr. Wolf was found not guilty of any participation in the alleged conspiracy. Therefore, we have a conspiracy in which, apparently, only two participants were involved. This conspiracy conviction is based upon the seller-buyer relationship which existed between Mr. Bommarito and Mr. Ciraco.

In order for Mr. Bommarito to sell Methamphetamine to Louis Ciraco, there was necessarily mutual cooperation between the two. Mr. Bommarito agreed to sell and Mr. Ciraco agreed to buy. Two people were necessary for the commission of this crime, and only two people participated in it. It is Mr. Bommarito's contention that, since this mutual cooperation was necessary for the commission of this crime, Mr. Bommarito may not be convicted of a "conspiracy" to commit it.

In so stating, Mr. Bommarito relies upon what has commonly come to be known as "Wharton's Rule." The classic

statement of this rule is:

> "When to the idea of an offense, plurality of agents is logically necessary, conspiracy, which assumes the voluntary accession of a person to a crime of such a nature that it is aggravated by a plurality of agents, cannot be maintained." 2 Wharton, Criminal Law, §1604 12th. Ed. (1932).

The Courts seem to justify this rule on the basis that when two persons conspire to commit such an offense, there is no danger beyond that inherent in the offense itself. Cf Developments in the Law - Criminal Conspiracy, 72 Harv. L. Rev. 920 (1959). The classic cases in which the Warton Rule has been applied are dueling, bigamy, incest and adultery. 2 Wharton, Criminal Law §1604 12th. Ed. (1932). To these may be added gambling, People v. Purcell, 304 Ill. App. 215, 26 N.E. 2d. 153 (1940), the giving and receiving of bribes, People v. Wittingel, 98 Colo. 193, 58 P. 2d. 279 (1935), and the buying and selling of contraband goods, United States v. Katz, 271 U.S. 354 (1926).

This Rule has been adopted and applied in the Second Circuit as revealed by the opinion in United States v. Zeuli, 137 F. 2d. 845 (2nd. Cir., 1943). In Zeuli, the defendant was convicted of a conspiracy to steal ration books and to receive them with intent to convert them, knowing them to have been stolen. Five other defendants were indicted with him. The proofs showed that two of the defendants had stolen the ration books and, eventually, Zeuli agreed to purchase some of the stolen books.

In determining if Zeuli was guilty of a conspiracy

in that case, the Court stated:

> "If the conspiracy was confined to the transaction between Zeuli and Steneck by which the stolen books were sold, although both were guilty of the substantive crime, neither was guilty of a conspiracy." 137 F. 2d. at 846.

However, as the Court in Zeuli went on to say that the indictment charged, not only this transaction, but also alleged a single conspiracy which comprehended not only the disposal of the books, but their original theft. Even though the indictment thus alleged Zeuli's participation in the theft of the ration books, the Court refused to find Zeuli guilty of conspiracy. As the Court stated:

> "That might have been true, if, when Zeuli bought the books, he had been told of the scheme to steal and later to sell them and had agreed to buy them in order to further that scheme. But that was not the situation; although he knew them to be stolen, he bought them without any purpose of securing to the thieves the fruits of their theft; the venture, so far as he was concerned began, as it ended, with the purchase." 137 F. 2d. at 847. (Emphasis added.)

Based upon this rationale, the Court thus found Zeuli could not be convicted of any conspiracy whatsoever.

In the present case, as in Zeuli, Mr. Bommarito's concern with the distribution of Methamphetamine began and ended with the purchase of this substance by Louis Ciraco in Florida. After this, Mr. Bommarito had no interest in what Louis Ciraco did with the narcotics. All Mr. Bommarito was interested in was the payment for the purchase. In fact, during the cross-examination of Mr. Ciraco by defense counsel, it is revealed:

Q: So what you did in New York was your own business, isn't that true, so long as you paid for the narcotics?

A: So long as I paid for it yes.

Q: Mr. Bommarito wasn't going to participate with you in any way in anything that you did in New York, was he?

A: Not to my knowledge.
Appendix, Page 7b.

Thus, as in Zeuli, we have a situation where a party convicted of conspiracy had no further interest in the venture once the purchase had taken place. Also, as in Zeuli, the conspiracy convictions in the present case must be reversed.

In order for anyone to be guilty of distribution of narcotics, he must have another party with whom he dealt. No one person can buy and sell to himself. In order to distribute narcotics, possession must change hands. That is what happened in this case. The narcotics passed from Mr. Bommarito to Mr. Ciraco. That is the minimum number of people needed to violate the statute involved here. Therefore, Wharton's Rule clearly applies here and Mr. Bommarito's conviction must be reversed.

Although Wharton's Rule has been held not to apply when the number of persons involved exceeds the number of participants essential to the contemplated crime, United States v. Becker, 461 F. 2nd. 230 (2nd. Cir., 1972), the present case is not such a situation. The only extra party charged was Herbert Wolf, and he was found not guilty of conspiracy. Thus, the instant case is different from Becker, supra, in which the extra participants charged in the indictment were also found guilty

of conspiracy.

As additional support for Mr. Bommarito's proposition that he cannot be convicted of conspiracy in this case is United States v. Sager, 49 F. 2d. 725 (2nd. Cir., 1931). In Sager, the Court stated at Page 727:

> "Where concert is necessary to an offense conspiracy does not lie. There may not be a conspiracy founded on a crime to commit bribery between persons, one charged with the intended taking and several charged with giving the same bribe. Concert is always necessary to an agreement to take and to give a bribe, it is always necessary to an taking and an intended giving, and it is necessary to the receipt of a bribe and the giving of a bribe." (Citations omitted.)

The delivery of narcotics from Mr. Bommarito to Louis Ciraco was, as a bribe, an action that involved concert of action. Therefore, no conspiracy can lie for its commission. In addition, as previously stated by referring to Zeuli, supra, since Mr. Bommarito's concern with the transaction ended with the purchase, his crime cannot be that of conspiracy.

Therefore, Appellant contends the conspiracy charge must be reversed.

II

THE FACTS IN THIS CASE DO NOT SUPPORT A CONSPIRACY CONVICTION.

A

EVIDENCE OF EVENTS THAT OCCURRED AFTER MARCH 8, 1974, MUST BE RESTRICTED TO ONLY SHOWING INTENT AND KNOWLEDGE PRIOR TO MARCH 8, 1974, AND WHEN SO RESTRICTED, INDICATE THAT NO CONSPIRATORIAL AGREEMENT WAS EVER REACHED.

The Government alleges in this case that a conspiracy existed to distribute narcotics in Florida, New York and Detroit. As one of the overt acts alleged in the Indictment, the Government lists the distribution of one (1) pound of narcotics in Detroit on March 14, 1974. That act, and any other act that occurred in Detroit or anywhere else after March 8, 1974 may not be considered as part of any possible conspiracy involved here for the reason that the essential element of a conspiracy, an agreement between two or more persons, was lacking.

On March 8, 1974, Mr. Ciraco was arrested while attempting to distribute narcotics. On March 9, 1974, he reached an agreement to cooperate with the Government. At that point, he became a Government "informer" or "agent." It is well established that one who acts as a government informer cannot be a co-conspirator. Cf Sears v. United States, 343 F. 2d. 139 (5th. Cir., 1965). The reason given for this rule is that, where one party lacks the actual intent to conspire, there is no agreement between the parties to do an unlawful act (or to do a lawful act by unlawful means). Since agreement is the

gist of a conspiracy, lack of the agreement bars the existence of conspiracy.

In United States v. Chase, 372 F. 2d. 453 (2nd. Cir., 1967), all members of a gambling ring were arrested on the 5th. of April, except the "backer," Mr. Chase, the defendant therein, who was arrested on July 10th. One of those arrested was a government informer who continued to place bets under government scrutiny and with government funds with Mr. Chase after April 5th. No other bets were shown to have been placed with Chase after April 5th. Mr. Chase was eventually arrested and charged with a conspiracy that lasted until July 10th. The Court held that the conspiracy ended on April 5th. when all the co-conspirators were arrested. The Court reasoned that, since no person other than a government informer placed bets, and a government informer cannot be a conspirator, there was no other person with whom Chase could conspire. The Court further stated that:

> "Although the indictment also alleges a conspiracy 'with divers other persons whose names are to the grand jurors unknown,' there was no proof of such other persons, known or unknown, and the court cannot infer that because once the backer of a gambling operation, Chase continued uninterruptedly as the backer of a gambling operation after the arrests." 372 F. 2d. at 459.

The facts in the case at bar are extremely similar to those in Chase. On March 8, 1974, Mr. Ciraco was arrested and the next day became a government informer, so he cannot be a co-conspirator. Since Mr. Wolf was acquitted of conspiracy charges, the only named conspirator remaining was Mr. Bommarito, and he cannot be a conspirator with himself. While the Indict-

ment alleges unknown conspirators, there was not a scintilla of proof offered at Trial to show that Mr. Bommarito engaged in any narcotics activity after March 8, 1974, other than with government agents. The act of distribution in Detroit occurred between Mr. Bommarito and informer Ciraco and agent Senneca and thus cannot be considered an overt act of the conspiracy. Any agreement between Mr. Bommarito and Informer Ciraco and Agent Senneca reached after March 8, 1974 for the sale of narcotics cannot be considered as part of a conspiracy because there were not two parties existing with the actual intent to conspire. The Court, under Chase, supra, cannot infer that other activities with non-government agents occurred where no proof existed at Trial. Since Mr. Bommarito could not conspire with himself, no conspiracy can be said to have existed after March 8, 1974.

Therefore, under the rule of United States v. Chase, supra, if a conspiracy existed at all, it must be shown that it existed prior to March 9, 1974. The importance of this ruling is that the Trial Court is restricted in its use of the post March 8, 1974 evidence. It cannot be used to show that the conspiracy existed, but as allowed in Chase, it may be admitted Only to show Mr. Bommarito's willingness to participate in the conspiracy with intent to advance its purpose. United States v. Chase, supra, at Page 460.

The concern in this Appeal is that the Trial Court did not restrict its use of post March 8th. material and, even if it was not improperly admitted, it was improperly interpreted in that the admitted events clearly reveal that no "agreement" to distribute existed. Since we have no finding of facts from

the Trial Court, Appellant has no means of determining how the evidence was used, but the record is absolutely devoid of any indication that the Judge intended to so restrict the use of the evidence. In Chase, the issue of properly restricted use is not reached. In that case, however, the issue of whether a conspiracy existed was not as close a question as it is in our case. In that case, there was a widespread agreement present; in our case, the alleged agreement is much more limited in scope and, whether any agreement existed at all is being disputed in this Appeal. In Chase, however, where there was the possibility that the conviction of one of Chase's co-conspirators was tainted by post April 5th. (the day the conspiracy ended) evidence, the conviction was reversed. The Court in Chase reasoned that, while the Trial Court stated that he would admit the evidence subject to relevancy, the Trial Court never made the affirmative showing that the evidence was not used against the co-conspirator. In our case, a case where the issue of whether a conspiracy existed is a very close issue, the Trial Court's decision should not be tainted by an improper use of evidence. As stated earlier, nowhere is it indicated that it restricted its consideration of the evidence. This in itself merits at least a new Trial where that evidence would be kept in its proper perspective.

Even if this Court finds that the post March 8th. events were properly admitted by the Trial Court, an analysis of the events reveals that no conspiracy existed. The original purpose for any activity after March 8, 1974 was for final payment of $4,000.00 for the one (1) pound of narcotics. When

Mr. Ciraco went to Detroit with the government agents, it was Agent Senneca, by his own testimony, who approached Mr. Bommarito about making further purchases. Appendix Page 9b. Prior to that time, no concrete discussion of future purchases occurred. Further proof that post March 8th. events indicate no conspiracy existed before that day, lies in the fact that, after agreement for a second sale could not be reached, Mr. Bommarito did not try to persuade the agents to finish the transaction. In fact, the trial testimony of Mr. Ciraco indicates that, after final payment was made for a second pound picked up in Detroit, Mr. Bommarito made no attempt to contact any of the agents, even though Mr. Ciraco said a sale was in the works. Appendix, Page 8b. Mr. Ciraco finally called Mr. Bommarito almost two (2) months after the final payment mentioned above just "to keep in contact." No further contact was made. Certainly, that is not evidence of a continuing agreement and, in fact, shows that nothing more was intended than a buy-sell relationship. Mr. Bommarito's attitude was simply - if you want to buy, fine; if not, that's okay, too.

B

THE MERE AGREEMENT TO SELL AND BUY NARCOTICS DOES NOT PROVE THE EXISTENCE OF A CONSPIRACY.

Having narrowed the scope of our inquiry to those acts which occurred prior to March 8, 1974, the question then is, what was the agreement that existed between Mr. Bommarito and Louis Ciraco? Was the agreement entered into between them of such a nature that they had formed a conspiracy to distribute narcotics? On the other hand, was their agreement merely for one to sell and one to buy narcotics, thereby showing that no conspiracy existed whatsoever? Mr. Bommarito contends that this latter statement accurately describes the relationship which existed between Mr. Bommarito and Louis Ciraco.

In Direct Sales Company v. United States, 319 U.S. 703 (1943), the Appellant, a wholesale company which distributed narcotics, was found guilty of conspiring with a small-town physician to illegally dispense Morphine.

In considering whether the actions taken by Direct Sales Company in this matter made it guilty of conspiracy, the Court looked at four (4) factors: (1) the quantity of sales; (2) the continuity of the relationship between the seller and the buyer; (3) initiative or encouragement being offered by the seller; and (4) the nature of the goods involved. Since each of these factors were satisfied in Direct Sales, supra, the Court found the Appellant had a sufficient stake in the venture to make it guilty of conspiracy.

In order to determine if a conspiracy to distribute narcotics was formed in the present case, the crucial determination to be made is what was the nature and scope of the agreement entered into by Louis Ciraco and John Bommarito in Florida? If this agreement did not include or was not intended to include any significant interest by Mr. Bommarito in what Louis Ciraco did with the narcotics once he received them, then we do not have a conspiracy.

As was stated in Direct Sales, supra:

> "Concededly, not every instance of sale of restricted goods, harmful as are opiates, in which the seller knows the buyer intends to use them unlawfully, will support a charge of conspiracy." 317 U.S. at 712.

In a footnote to the above-quoted statement, the Court further stated:

> "This may be true, for instance, of single or casual transactions, not amounting to a course of business, regular sustained and prolonged, and involving nothing more on the seller's part than indifference to the buyer's illegal purpose and passive acquiescence in his desire to purchase for whatever end... There may be also a fairly broad latitude of immunity for a mere continuous course of sales, made either with strong suspicion of the buyer's wrongful use or with knowledge, but without stimulation or active incitement to purchase." 317 U.S. at 712. (Emphasis added)

In the present case, the evidence showed a sale of Methamphetamine from Mr. Bommarito to Louis Ciraco in Florida in early 1974. Once the sale took place, Mr. Bommarito was only concerned with collecting the agreed upon purchase price. There was only one transaction between the two parties prior to March 8, 1974. Mr. Bommarito had no interest in what Louis

Ciraco did with the narcotics once he received them.

Even if we assume the relationship between Mr. Bommarito and Louis Ciraco was of a more continous nature, under the footnote quoted above, it is clear that broad immunity may be allowed when there has been no active incitement to purchase.

Again in the present case, the evidence revealed that Louis Ciraco came to Florida looking for someone from whom he could purchase narcotics. Mr. Ciraco actively sought out a contact. The sale was made only as a result of Mr. Ciraco's efforts. Further, the transaction which took place in Detroit only resulted from actions initiated by Louis Ciraco and Agent Senneca. In fact, Agent Senneca and Louis Ciraco attempted to induce Mr. Bommarito to sell narcotics on this occasion.

In United States v. Peoni, 100 F. 2d. 401 (2nd. Cir., 1938), the question of what constitutes a conspiracy was considered with facts analogous to the present case. In Peoni, supra, Peoni sold counterfeit bills to a second party, who then sold these bills to a third party, all three having knowledge that the bills were counterfeit.

In considering the conspiracy charge against Peoni, the Court found that it was absurd to believe there had been an agreement between Peoni and his purchaser that a third party should have the counterfeit bills. Thus, the Court found no conspiracy to exist.

In so stating, the Court said:

> "Peoni knew that somebody besides Rigno might get them, but a conspiracy also imports a concert of purpose, and again Peoni had no concern with the bills after Rigno paid for them...Nobody is liable in the conspiracy except for the fair import of the concerted purpose or agreement as he understands it; if later comers change that, he is not liable for the change; his liability is limited to the common purpose while he remains in it." 100 F. 2d. at 403.

As in Peoni, supra, Mr. Bommarito knew that someone besides Louis Ciraco might get the narcotics, but he had no concern with that as long as he got paid for what he had given to Mr. Ciraco. As far as Mr. Bommarito understood, the agreement with Mr. Ciraco was that he would sell him a pound of Methamphetamine and Mr. Ciraco would purchase that pound. This was the full extent of the agreement as Mr. Bommarito understood it, and, under Peoni, Appellant was only liable for the agreement as he understood it.

The rationale of Direct Sales and Peoni has been applied to other cases similar to the one at bar. In United States v. Spanos, 462 F. 2d. 1012 (9th. Cir., 1974), the defendant was charged with conspiring to distribute narcotics. The proof showed that the defendant sold the pills to a second party who then sold to a third party. There was no evidence which showed that the defendant had agreed with this second party to resell to anyone at the time of the first sale. When this second party later attempted to buy again from Defendant, this time the defendant was aware the purchase was to be for a planned resale, the defendant refused to participate in the transaction.

In considering the conspiracy charge, the Spanos Court found that, even though the defendant probably knew this second party would probably resell, he was not guilty of participating in a conspiracy since there was no evidence to show this defendant had agreed to resell to anyone. When the opportunity to get involved in an agreement to resell had been presented, the defendant had refused.

In the present case, there is no evidence whatsoever of any agreement by Mr. Bommarito and Louis Ciraco to resell anything. This is so, even though, as in Spanos, Mr. Bommarito probably knew Mr. Ciraco would resell the narcotics.

The Government may respond by saying Spanos is distinguishable from the present case because, when the opportunity for a sale arose in Detroit, Mr. Bommarito did not refuse to participate. However, even if this evidence is relevant and properly admissible, this second sale did not involve an agreement between Appellant, Ciraco and Agent Senneca for the resale of narcotics. This transaction was a separate transaction, a separate sell-buy relationship and nothing more.

In United States v. Koch, 113 F. 2d. 982 (2nd. Cir., 1940), the defendant was charged with conspiracy to violate federal narcotics laws. The evidence showed that one of the co-conspirators obtained a large quantity of Cocaine and supplied it to one Mauro. Approximately two months later, Mauro met the defendant and agreed to sell him a substantial quantity of the Cocaine. The defendant purchased the Cocaine. Because of this activity, the defendant was convicted of conspiracy.

In reviewing this conviction, the Court found:

> "The purchase of the Cocaine from Mauro was not enough to prove a conspiracy in which Mauro and the Appellant participated. They had no agreement to advance any joint interest. The Appellant bought at a stated price and was under no obligation to Mauro except to pay him that price..." 113 F. 2d. at 983.

Applying this rationale to the present case, there can be no conspiracy conviction here. There was a purchase of narcotics in Florida by Mr. Ciraco. This purchase was for a stated price ($5,500.00), and there was no obligation by Ciraco to Mr. Bommarito, except to pay that price. See Appendix, Page 7b. Therefore, there was no conspiracy.

The Government may respond to this entire line of argument by referring this Court to United States v. Bruno, 105 F. 2d. 922 (2nd. Cir., 1939), and those cases which follow it. Basically, Bruno holds that, where the persons at one end of the chain of activity knew that their unlawful business would not stop with their buyers and those at the other end knew that it had not begun with their sellers, we have a conspiracy. This has been referred to as the chain theory of conspiracy. The Government may argue that applying Bruno to the present case, since Mr. Bommarito knew the activity would not stop with his buyer, he was guilty of conspiracy to distribute.

In response, let us first state that in Peoni and Spanos, the defendant knew further activity might take place and yet, since there was no agreement to resell, the Court found no conspiracy. Secondly in Bruno, there were 87 conspirators and many of them were convicted. With such a large scale network,

the evidence that Bruno knew there was to be further activity is abundantly clear. However, in the present case, only one man, Mr. Bommarito, was convicted of conspiracy. We only have evidence of a seller and a purchaser. Although Mr. Bommarito may have known that Mr. Ciraco may resell, the situation was not like Bruno where the Court found the unlawful business could not stop with the buyers.

> "The relationship of buyer and seller absent prior or contemporaneous understanding beyond the mere sales agreement does not prove a conspiracy to sell, receive, barter or dispose of stolen property although both parties know of the stolen character of the goods. In such circumstance, the buyer's purpose is to buy; the seller's purpose is to sell. There is no joint objective." United States v. Ford, 324 F. 2d. 950 (7th. Cir., 1963)

Due to the nature of the agreement between Mr. Bommarito and Mr. Ciraco, and to the sheer number of participants involved, the present case is more closely analogous to Peoni than it is to Bruno. There was no prior or contemporaneous agreement between Mr. Bommarito and Mr. Ciraco beyond the sales agreement. Under these circumstances, there was no conspiracy.

Mr. Bommarito and Mr. Ciraco entered into an agreement for the sale and purchase of narcotics. Whereas in Direct Sales, supra, there was a continuing relationship, active incitement by the seller to buy, and a large quantity of sales thereby showing the defendant had a stake in those resales made by the buyer, this is not true here.

There was no active incitement by Mr. Bommarito for

Mr. Ciraco to buy. Mr. Ciraco expressed interest in narcotics and sought out a seller. Mr. Bommarito became that seller. There was no continuing relationship during which numerous sales were made. There was a sale in Florida. After that, Mr. Bommarito conversed with Mr. Ciraco, but those conversations related to the payment of money due and owing.

Eventually, Mr. Bommarito met Ciraco again. This occurred in Detroit. The meeting was established and was understood to be for the purpose of paying Mr. Bommarito the money owed on the Florida narcotics purchase. This was why Mr. Ciraco told Mr. Bommarito that he wanted to meet him. At this time, a second sale was discussed, but this was only after Agent Senneca approached Mr. Bommarito and asked to transact a deal. This clearly was not a case of Mr. Bommarito actively encouraging Mr. Ciraco to find buyers or to resell narcotics. On the contrary, this is a case of the Government's encouraging Mr. Bommarito to make sales.

However, in either case, there was never any activity at this Detroit meeting that showed a prior agreement between Mr. Bommarito and Louis Ciraco to conspire to distribute narcotics.

There had been an agreement between Mr. Bommarito and Mr. Ciraco in Florida, but that agreement was for the sale and purchase of one pound of Methamphetamine. Once the price was paid, Mr. Bommarito cared not what Mr. Ciraco did with the narcotics. Even Mr. Ciraco understood their relationship to be such. Under Peoni, Koch and Ford, no conspiracy existed.

C

THE FACTS IN THIS CASE, AS EVIDENCED BY THE WEAKNESSES IN THE GOVERNMENT'S FINAL ARGUMENT, DO NOT ESTABLISH BEYOND A REASONABLE DOUBT THAT A CONSPIRACY EXISTED.

In his final argument to the Trial Court, the Government Attorney described a series of events that were the "clearest possible evidence" of a conspiracy. See Appendix, Page 10b. Anything more than a surface analysis of those events, however, reveals the opposite to be true. The crucial element to be considered in determining if, in fact, Mr. Bommarito was guilty of conspiring to violate Federal Narcotic Laws, was the nature of the agreement he had entered into with Mr. Ciraco. While circumstantial evidence may be admitted and used to help decide whether a conspiracy existed, Blumenthal v. United States, 332 U.S. 539 (1947), that evidence must still show that a conspiratorial agreement existed beyond a reasonable doubt. Looking at each of the events relied upon by the Government, it cannot be said that there was an agreement beyond a reasonable doubt. In fact, the events described, properly interpreted, conclusively show that no agreement other than to enter a mere buyer-seller relationship existed.

The Government, in its final argument, first alleges that this was not a single transaction arrangement. The vital point to note, however, is that no agreement for subsequent sales was even considered during the Florida meetings. The telephone contact between Mr. Bommarito and Mr. Ciraco,

alleged by the Government Attorney as further proof of conspiracy, was merely an effort on the part of Mr. Bommarito to insure that he would eventually be paid in full the monies due and owing him. During those calls, there was never a discussion of future sales, but only conversation as to how soon payment for the single pound delivered would be made. Mr. Bommarito never intended to establish a continuing partnership or relationship. Even if Mr. Ciraco had intended future purchases, this intent was never communicated to Mr. Bommarito. Further still, the prosecution must prove that Mr. Bommarito himself had the specific intent, not just the alleged co-conspirator.

The prosecutor next cites, as the "clearest possible evidence" of conspiracy, Mr. Bommarito's statement to Mr. Ciraco in which he questions Mr. Ciraco as to "when we can do the scam." The prosecutor alleges that this statement refers to future deals. Taken in context, however, the statement actually refers to when final payment will be made for the first pound, and not to any future deals. See Appendix, Page 9b.

The prosecutor next alleges that the negotiations in Detroit between Mr. Bommarito and Agent Senneca are "clear" evidence of conspiracy. First of all, those acts occurred after the conspiracy ended, United States v. Chase, supra, and, secondly, those negotiations were initiated by Agent Senneca. Mr. Bommarito did not solicit Agent Senneca.

Next, the prosecutor alleges that the elaborate code set up for confirmation of the second sale is evidence of a

conspiracy. Again, that code was only for security purposes; it did not have anything to do with continuous sales. In fact, after the second deal, which Agent Senneca initiated, was cancelled, Mr. Bommarito never approached the agents for a future sale.

Lastly, the prosecutor alleges that, knowledge on Mr. Bommarito's part that Mr. Ciraco would resell the drugs shows his conspiratorial intent. The prosecution, however, failed to show that Mr. Bommarito intended Mr. Ciraco to resell the drugs, or had any control as to when, how, where or if they would be sold. Knowledge is not intent.

The weaknesses in the Government's final argument, as pointed out above, almost self-evidently point to the conclusion that the facts in this case do not establish beyond a reasonable doubt that a conspiracy existed between Mr. Bommarito and Mr. Ciraco.

III.

DEFENDANT BOMMARITO'S PRIOR CONVICTION FOR HIS PARTICIPATION IN A LARGE SCALE NARCOTICS CONSPIRACY BARS THIS SUBSEQUENT NARCOTICS CONSPIRACY CONVICTION ON THE BASIS OF DOUBLE JEOPARDY.

In the arguments presented above, Mr. Bommarito has contended that the relationship between himself and Louis Ciraco was simply that of a supplier of contraband to a purchaser of the same. Once Mr. Ciraco paid for the contraband supplied to him, Mr. Bommarito had no stake as to what happened to the narcotics. This was the full agreement between the parties. Under Peoni, supra, and those cases following its rationale, the agreement to supply and the supplying of contraband to Louis Ciraco by John Bommarito did not constitute a conspiracy, even though Mr. Bommarito knew that someone besides Louis Ciraco might get these narcotics.

In response to this argument, the Government at the Trial in this matter, contended that the situation which had developed between Mr. Bommarito and Louis Ciraco constituted a "classical" case of conspiracy. It was their position that the evidence revealed a continuing agreement between Mr. Bommarito and Mr. Ciraco during which Mr. Bommarito had a direct stake in the narcotics transactions made by Louis Ciraco in New York during March of 1974.

Although Appellant believes his arguments relative to whether Mr. Bommarito was part of a conspiracy to distribute narcotics, conclusively show that no conspiracy did exist, let us assume arguendo that the Government has suffi-

ciently established that a conspiracy did exist.

If such a conspiracy did exist in the present case, it is Mr. Bommarito's position that the present conspiracy conviction is barred by the doctrine of Double Jeopardy.

The Indictment in the present case asserts that the conspiracy began in December of 1973. The Government's proof at the Trial allegedly proved that this conspiracy continued on into March of 1974. The conspiracy in the present case was formulated in Florida in December of 1973 and involved the eventual distribution of Methamphetamine. The Indictment in this case further alleged that other co-conspirators unknown to the Grand Jury were also involved in this conspiracy network which had as its ultimate purpose the distribution of narcotics in the New York area.

Prior to this conspiracy conviction of Defendant Bommarito in New York, Mr. Bommarito had pled guilty to conspiracy to violate the Controlled Substances Act, Title 21, United States Code, under an Indictment filed in the United States District Court for the Western District of Oklahoma. This conspiracy had operated from about February, 1974 to September of 1974. This conspiracy involved ten (10) named co-conspirators and other co-conspirators unknown to the Grand Jury. The narcotics involved in this conspiracy were Cocaine and Methamphetamine. Under this Indictment, Mr. Bommarito was specifically held to have delivered ten (10) pounds of Methamphetamine. This was listed as one of the

overt acts in the overall conspiracy.

It is this prior conspiracy conviction which Appellant contends bars the conspiracy conviction in this case. The conspiracy conviction in New York constitutes a second conviction for the same offense.

In United States v. Mallah, 503 F. 2d. 971, (2nd. Cir., 1974), a similar set of facts existed. In Mallah, supra, one Pacelli was convicted of conspiracy to violate federal narcotics laws. Prior to this conviction, Pacelli had previously been convicted of conspiracy to violate the federal narcotics laws in 1972. Pacelli thereby asserted that his present conspiracy conviction was barred by double jeopardy.

In responding to Pacelli's double jeopardy claim, the Government contended that the two convictions were independent of each other. In support of this argument, the Government pointed to the following factors: (1) No named co-conspirators were common to the two Indictments; (2) Different overt acts were alleged in each Indictment; (3) One conspiracy ended in 1973, whereas the other conspiracy allegedly ended in 1971; (4) And one conspiracy established activity only in New York, while the other conspiracy had also involved narcotics distribution into the Midwest.

According to the Government in Mallah, supra, these four (4) differences between the two (2) conspiracies conclusively showed Pacelli had not been twice convicted for the same offense. In responding, this Court answered by saying, (1) That

the non-identity of named co-conspirators in the two cases did not mean there was no overlap in personnel other than Defendant, Pacelli; (2) Since the Defendant had been a core member of a large scale conspiracy, the words "others unknown to the Grand Jury," which had been included in the Indictment, might very well refer to persons who had been involved in the earlier conspiracy, thereby aiding the contention that only one conspiracy existed; (3) The mere fact that each conspiracy case alleged different overt acts was of little significance, since this distinctiveness could easily be due to prosecutorial discretion; (4) The mere fact that both conspiracies did not start and stop at the exact same times did not thereby show two independent conspiracies, particularly since there was some overlap in the periods during which the conspiracies had run.

Therefore, in Mallah, supra, these differences between the two cases were not sufficient to rebut Defendant's contention that his second conspiracy conviction constituted double jeopardy. This Court then looked at the facts to see if Pacelli's earlier conspiracy did indeed bar this second conspiracy conviction.

Since the facts revealed that the conspiracy had been a large scale one, that Pacelli appeared to be a core member of both conspiracies, that the narcotics business is such that it is likely to be backed up by a large organization and that there was overlap in the running of the conspiratorial periods of activity, this Court found Pacelli had sufficiently met his burden of putting forth the double jeopardy issue.

An important factor in Mallah, supra, was the fact that the conspiracy involved narcotics, and as the Court stated:

> "One who deals in large amounts of narcotics is held to the knowledge that there is a large criminal organization which is making that deal possible, and one is liable as a co-conspirator, even though one has no personal knowledge of the identity of the co-conspirators." 503 F. 2d. at 983.

Because this Court apparently recognized that narcotics transactions of any substantial quantity are likely to involve a large organization, this factor aided Pacelli's claim that his activity in both conspiracies was really one overall action.

In the present case, as in Mallah, supra, we have two conspiracies, assuming New York was a conspiracy, which involved a substantial quantity of drugs. Similarly, Mr. Bommarito was a core figure in both cases. Additionally, the exact same narcotic was involved in each case, implying Mr. Bommarito's manufacturers or prior distributors were probably the same in each case. This becomes even more probable since both activities occurred during the same time span.

Although there were no common named co-conspirators in both Indictments, this Court's opinion in Mallah, supra, shows that this factor is not dispositive of the double jeopardy claim. In fact, as in Mallah, both Indictments in this case named unknown co-conspirators as part of each conspiracy.

Although the Oklahoma Indictment listed different overt acts than the New York Indictment, again, Mallah states

this does not establish two separate conspiracies, since this distribution can result simply from prosecutorial discretion.

In Mallah, supra, this Court stated that, if the Government can establish that one conspiracy ended before the other began, this would certainly help establish two independent conspiracies. In this regard, this Court stated:

> "In many cases, there may be nothing indicating any connection between the parties or agreements. ...(Citations Omitted). Of course, the element of time will be of considerable importance in that determination." 503 F. 2d. at p. 986.

In the present case, the time factor helps to show that Mr. Bommarito's participation in both the conspiracy in New York and in Oklahoma were really one large conspiracy. There is no question that both conspiracies, if New York was, in fact, a conspiracy, were in progress during the same period of time. The activities in Oklahoma ran from at least February of 1974 until September of 1974. In fact, it would appear that this conspiracy began much earlier than that, since the Indictment only states that the execution of the conspiracy began in February of 1974, not that it was formed at that time.

In the present New York case, the activities of Mr. Bommarito ran from at least December of 1973 until April of 1974. Thus, if we have a conspiracy, we have at least three (3) months of activity which is common to both alleged conspiracies. Certainly, this identical span of time goes a long way towards showing one overall conspiracy. This becomes even more apparent when we consider the additional fact that the same narcotic, Methamphetamine, was involved in both jurisdictions.

In the Oklahoma conspiracy, Mr. Bommarito's part in this conspiracy involved the distribution of ten (10) pounds of Methamphetamine. Such a large amount of narcotics, which was then distributed throughout Oklahoma, would certainly classify Mr. Bommarito as a key core member of this conspiracy. Additionally, because of the quantity of narcotics involved and the number of co-conspirators, it is clear that Oklahoma involved a large scale organization which most likely included acts in other states as to both the manufacture and distribution of narcotics. Merely because all the overt acts alleged in the Oklahoma Indictment refer solely to Oklahoma does not mean that there was not activity outside of Oklahoma. In fact, as this Court acknowledged in Mallah, supra, merely because overt acts are different in each conspiracy, is of little consequence in determining if one conspiracy existed, since this difference can easily be the product simply of prosecutorial discretion.

The Government may very well respond by saying that Mr. Bommarito's activities in the present case involved such a large scale of quantity of narcotics that he surely knew Mr. Ciraco would distribute these drugs in the New York area. The Government will further assert Mr. Bommarito had a direct conspiratorial stake in this distribution. However, at the same time, the Government will contend that this conspiracy was so limited and narrow as to not include any other activities being perpetrated by Mr. Bommarito in other parts of the country.

The Government should not and cannot be allowed to characterize Mr. Bommarito as such a large scale distributor of

narcotics in order that this Court find Mr. Bommarito to be a conspirator and yet, at the same time, contend this activity was not part of any other larger conspiracy.

If, in fact, Mr. Bommarito was a conspirator in New York, he was there acting as only one facet of his nationwide narcotic distribution activities. For Mr. Bommarito's role in this kind of activity, he has already been convicted for his conspiracy role. The conviction in the present case only amounts to a second conviction for that same offense. Therefore, this conviction should be dismissed.

IV.

IN ORDER TO BE AN AIDER AND ABETTOR, ONE MUST ASSOCIATE HIMSELF WITH THE CRIMINAL ENTERPRISE, MUST PARTICIPATE IN IT AS SOMETHING HE WISHES TO BRING ABOUT AND SEEK BY HIS ACTIONS TO MAKE THE VENTURE SUCCEED. THE FACTS IN THIS CASE DO NOT SUPPORT THIS FINDING.

Mr. Bommarito was convicted of the substantive count of aiding and abetting Mr. Ciraco in the distribution of narcotics in New York. The mental state required for aiding and abetting, as stated in Hornbook in the Criminal Law, Lafave & Scott (1972), is where the:

> "...accomplice intentionally encourages or assists, in the sense that his purpose is to encourage or assist another in the commission of a crime as to which the accomplice has the requisite mental state." id at Page 506.

What is sought is intentional encouragement or assistance, given to aid another in a crime. The prosecutor must show three (3) facts existed before one may be convicted. First, one must associate himself with the criminal enterprise. Second, he must participate in it as something which he wishes to bring about. Finally, he must seek by his actions to make the venture succeed. United States v. Bryant, 461 F. 2d. 912 (6th. Cir., 1972); United States v. Harris, 441 F. 2d. 1333 (10th. Cir., 1971).

As fully developed above, it has been shown that Mr. Bommarito and Louis Ciraco entered into a buy-sell agreement for the sale of Methamphetamine in Florida in early 1974. The scope of this agreement was: You can have this pound of Methamphetamine if you agree to pay me $5,500.00. There was

no agreement or concerted plan as to what was to be done with this Methamphetamine once Louis Ciraco took possession of it. He was free to do whatever he desired to do with this. If he chose, he could use it for personal consumption, give it away, or sell it.

Although Louis Ciraco did, in fact, take this Methamphetamine back to New York for distribution, there is no evidence in the record that reflects any participation in this venture by Mr. Bommarito. It is important to remember that the activities in New York were a separate criminal enterprise. This was not part and parcel of the delivery of narcotics that had taken place in Florida.

Mr. Bommarito neither participated in the plans for distributing narcotics in New York, nor even the location where such narcotics were to be distributed. These choices were solely Mr. Ciraco's.

In total then, there is no evidence to show that Mr. Bommarito participated in a venture to distribute drugs in New York. Therefore, it is clear that Mr. Bommarito cannot be held guilty of aiding and abetting the acts of Louis Ciraco in New York.

V.

WHERE, IN THE INDICTMENT, THE GOVERNMENT FAILS TO PROPERLY CHARGE AN ACCUSED AS AN AIDER AND ABETTER RATHER THAN A PRINCIPAL WHERE THAT IS THE ONLY POSSIBLE GOVERNMENT THEORY, WHERE THE PROSECUTOR FAILS TO GIVE NOTICE OF THE OPERATION OF 18 U.S.C. 2, WHERE THE GOVERNMENT FAILS TO DISCLOSE THE IDENTITY OF THE PRINCIPAL, AND WHERE THESE FAILURES ARE A RESULT OF ACTS OF CARELESSNESS OF THE PROSECUTOR AND CAUSE ACTUAL SURPRISE AND PREJUDICE TO THE ACCUSED, THE CHARGE AND SUBSEQUENT CONVICTION MUST BE REVERSED IN ORDER TO PREVENT FRUSTRATION OF CONSTITUTIONALLY IMPOSED PROCEDURAL SAFEGUARDS.

Mr. Bommarito was indicted and convicted in a substantive count of aiding and abetting Louis Ciraco in the distribution and possession with intent to distribute a Schedule II controlled substance, to-wit: Methamphetamine. This second count of the Indictment charges Mr. Bommarito as a principal, but fails to give notice that the Government's actual theory was one of aiding and abetting. The Government knew that Mr. Bommarito was never in New York during the times in question in this case and lacked even a scintilla of proof that Appellant was a principal, either in the first or second degree. Yet, while the Government never considered charging Mr. Bommarito as a principal, they failed to give him notice of what their actual theory was. The Indictment also fails to indicate the principal whom Appellant allegedly aided and abetted, even though this information was also well known to the Government.

Counsel for Mr. Bommarito is well aware of statutory and case law that state an accessory may be charged as a principal, and counsel is further aware of other holdings that state

that the principal's name need not be stated on the Indictment. It has also been held that the Government need not give notice of the operation of 18 U.S.C. 2, allowing accessories to be charged and indicted as principal. However, it is Appellant's contention that prosecutorial failure to provide this information, when done without justification, is totally denigrating to our notions of due process. Such a procedure is reminscent of medieval times where the accused was not informed, prior to trial, of the charges against him.

In Russel v. United States, 369 U.S. 749 (1962), the United States Supreme Court stated that there are three (3) functions to be provided by an Indictment: the notice function, so counsel will have an opportunity to prepare, and prepare effectively, so that the trial will result in an accurate disposition; the double jeopardy function, so that the defendant will have sufficient information in order to know whether he may plead a previous acquittal or conviction; and a judicial review function, to give the courts an adequate basis upon which to apply facts to law and vice versa. On this Appeal, we are concerned with the first function, notice, which has its roots in the Sixth Amendment right of an accused to be informed of the nature of the charges against him.

Due process requires, at a minumum, that a defendant be given reasonable notice and opportunity to defend against that with which he is charged. United States v. Beard, 436 F. 2d. 1084 (8th. Cir., 1971). While 18 U.S.C. 2 permits the Government to charge and/or indict accomplices as principals, the Fourth

Circuit has stated:

> "Doubtless the better practice, wherever a basis for a charge of aiding and abetting is anticipated before trial, would be to have the indictment framed in the alternative or at least to have noted upon it a reference to 18 U.S.C. 2." United States v. Duke, 409 F. 2d. 669, 671 (4th. Cir., 1969).

All Defendant Bommarito was notified of prior to trial was that he unlawfully distributed a controlled substance in New York in violation of 21 U.S.C. 812, 841 (a)(1), and 841 (b)(1)(B), or basically, the language of the statute. A recitation of substantially the language of a statute in the charge of an indictment will be sufficient only if its generality neither prejudices the defendant in the preparation of his defense nor endangers his constitutional guarantee against double jeopardy. United States v. Palmiotti, 254 F. 2d. 491 (2nd. Cir., 1958). In this case, there was substantial prejudice to the defendant, Mr. Bommarito, due to the non-informative nature of the indictment. There are five (5) elements that this Court may consider in reaching the same conclusion:

1. Failure to charge Appellant as an aider and abetter when that was the only possible substantive count;

2. Failure to give Appellant notice of the operation of 18 U.S.C. 2;

3. Failure to disclose principal's name;

4. Failure of the Government to provide even an adequate notice of the charge contained in Count Two of the Indictment against Appellant, whether this was due to deliberate attempts to confuse the preparation of the defense or simply carelessness in the formation of the Indictment.

5. Failure of the Appellant to have an adequate ability to prepare, which was manifested by the expression of surprise by counsel at trial at having to defend an abetting charge rather than a principal charge. See Appendix, Page 10b.

Element Number 5. is the significant factor because so many constitutionally required safeguards can be frustrated when just one act of carelessness on the prosecution's part deprives a defendant of his ability to answer charges properly. In researching this area, counsel has been unable to find one case where the Government has provided so little information to a defendant by way of the Indictment, especially when that information was well known by the Government at the time the Indictment was formulated. In addition, this would not have prejudiced the Government case, unless, of course, the Government considers having a prepared and unconfused defendant a prejudice to its case.

In United States v. Houle, 490 F. 2d. 167 (2nd. Cir., 1973), this Court saved an indictment that failed to charge an accused with aiding and abetting by stating that the indictment asserted liability under 18 U.S.C. 2, thereby at least putting the accused on notice. Appellant in this case was not given even that.

Mr. Bommarito came to trial prepared to defend against being accused as a principal to distribution in New York. The defense involved showing that Appellant was not in New York during any of the times involved in this Trial. It was only at Trial that the Appellant found out that the Government intended to proceed on an accessory theory. As has been seen in the argument on the aiding and abetting conviction at Pages 36 - 37 of this Brief, it is a close issue that required preparation, much more preparation than was obtainable when notice was given at the Trial in this case. Counsel for Mr. Bommarito claimed surprise, See Appendix, Page 10b, but the Judge denied the claim. Ap-

parently, the Judge was under the misconception that 18 U.S.C. 2., was quoted in the Indictment, because the following conversation took place at Pages 234-235 of the Trial Transcript:

> "MR. DAVIS: The discovery was handled before I took the case. Looking at the motion for a bill of particulars I see no request for a characterization of the aider and abetter and as your Honor is fully aware, under U.S. versus Taylor, the Government does not have the burden of affirmatively --
>
> THE COURT: You put Section 2 in the indictment, that is for sure."

I am, of course, assuming that the Court's reference to Section 2. is actually 18 U.S.C. 2. If that statement by the Court does not indicate a misconception, it must be interpreted as an admonition to Mr. Davis to put in 18 U.S.C. 2. in indictments of the nature involved in this case. Under either interpretation of the Court's statement, notice of the aiding and abetting charge was an important factor to the Judge.

The Prosecutor must not be allowed to circumvent procedural safeguards established by the courts by playing cat and mouse games with people's lives. The purposes of abolishing the distinctions between principals and accessories did not include allowing the Prosecutor to deprive an accused of notice of the charges. The abolishment of distinctions was designed to facilitate trials where the principal was not apprehended or tried or was immune, since, at common law, an accessory could not be convicted without a principal also having been convicted. The abolition also allows alternative theories where the proofs are close, in order to prevent an accessory from being acquitted on technical evidentiary deficiencies. It is therefore Appellant's

contention that, in order to uphold this Court's notion of due process, it must find that, where the Prosecutor fails to charge an accused as an acccessory, where that is the only proof available; where the Prosecutor fails to give notice of the operation of 18 U.S.C. 2; where the Government fails to disclose the identity of the principal; where the Prosecutor has acted in bad faith in these failures because there is no explicable reason for them; and where the Appellant has shown surprise and prejudice, that that charge must be dismissed.

CONCLUSION

The Judgment of Conviction on the Conspiracy Count must be reversed for the following reasons: If the Government alleges that only Mr. Bommarito and Mr. Ciraco were involved in the sale of narcotics, then Wharton's Rule bars the conviction. If the Government alleges that there were participants involved in the chain of distribution after Mr. Ciraco's possession, the conviction must be reversed because the Government has failed to show a conspiratorial agreement existed between Mr. Bommarito and Mr. Ciraco. If the Government alleges that there were participants involved in the chain of distribution prior to the receipt of the narcotics by Mr. Bommarito, then the conviction is barred by the doctrine of double jeopardy.

The Judgment of Conviction on the substantive count of aiding and abetting must also be reversed because the Government failed to show that Mr. Bommarito had the requisite mental state and that the Government failed to satisfy due process notice requirements.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- JOHN P. BOMMARITO, Appellant.	Docket No. 75-1219.

AFFIDAVIT OF SERVICE

STATE OF MICHIGAN)
) SS.
COUNTY OF OAKLAND)

ERIC ROSENTHAL, being first duly sworn, deposes and says that on the 18th. day of July, 1975, he did serve upon the United States Attorney for the Southern District of New York two (2) true copies of Brief for Appellant John P. Bommarito and two (2) true copies of Appendix for Appellant John P. Bommarito by placing same in the United States Mail with the proper postage affixed thereto.

Eric Rosenthal
ERIC ROSENTHAL

Subscribed and sworn to before me
this 18th. day of July, 1975.

Holly F. Malarney
HOLLY F. MALARNEY, Notary Public
Oakland County, Michigan
My Commission expires: 9-5-76.